

MARKET CONDUCT SURVEILLANCE LAW

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Section 1. Short Title

This Act shall be known and may be cited as the Market Conduct Surveillance Law.

Section 2. Purpose and Legislative Intent

The purpose of this Act is to establish a framework for Insurance Department market conduct actions, including:

- A. Processes and systems for identifying, assessing and prioritizing market conduct problems that have a substantial adverse impact on consumers, policyholders and claimants;
- B. Market conduct actions by a commissioner to substantiate such market conduct problems and a means to remedy significant market conduct problems; and
- C. Procedures to communicate and coordinate market conduct actions among states to foster the most efficient and effective use of resources.

Section 3. Definitions

- A. "Commissioner" means the insurance commissioner of this state.

- B. "Complaint" means a written or documented oral communication primarily expressing a grievance, meaning an expression of dissatisfaction.
- C. "Insurer" means every person engaged in the business of making contracts of insurance and includes health maintenance organizations as defined in RCW §48.46.020 and health care service contractors as defined in RCW §48.44.010.
- D. "Market analysis" means a process whereby market conduct surveillance personnel collect and analyze information from filed schedules, surveys, required reports and other sources in order to develop a baseline understanding of the marketplace and to identify patterns or practices of insurers that deviate significantly from the norm or that may pose a potential risk to the insurance consumer.
- E. "Market conduct action" means any of the full range of activities that the commissioner may initiate to assess and address the market practices of insurers, beginning with market analysis and extending to targeted examinations. The commissioner's activities to resolve an individual consumer complaint or other report of a specific instance of misconduct are not market conduct actions for purposes of this Act.
- F. "Market conduct surveillance personnel" means those individuals employed or contracted by the commissioner to collect, analyze, review or act on information on the insurance marketplace that identifies patterns or practices of insurers.
- G. "National Association of Insurance Commissioners" (NAIC) has the same meaning as in RCW §48.02.140.
- H. "NAIC *Market Analysis Handbook*" means the outline of the elements and objectives of market analysis developed and adopted by the NAIC, and the process by which states can establish and implement market analysis programs, or a successor product.
- I. "NAIC *Market Conduct Examiner's Handbook*" means the set of guidelines developed and adopted by the NAIC that documents established practices to be used by market conduct surveillance personnel in developing and executing an examination, or a successor product.
- J. "NAIC *Market Conduct Uniform Examination Procedures*" means the set of guidelines developed and adopted by the NAIC designed to be used by market conduct surveillance personnel in conducting an examination, or a successor product.

- K. "NAIC Standard Data Request" means the set of field names and descriptions developed and adopted by the NAIC for use by market conduct surveillance personnel in an examination, or a successor product.
- L. "Qualified contract examiner" means a person under contract to the commissioner, who is qualified by education, experience or professional designations, to perform market conduct actions.
- M. "Targeted examination" means a focused examination, based on the results of market analysis indicating the need to review either a specific line or lines of business or specific business practices, including but not limited to underwriting and rating, marketing and sales, complaint handling, operations and management, advertising, licensing, policyholder services, non-forfeitures, claims handling, and policy forms and filings. A targeted examination may be conducted by desk examination or by an on-site examination.
- (1) "Desk examination" means a targeted examination that is conducted by an examiner at a location other than the insurer's premises. A desk examination is usually performed at the Insurance Department's offices with the insurer providing requested documents by hard copy, microfiche, discs or other electronic media, for review.
- (2) "On-site examination" means a targeted examination conducted at the insurer's home office or the location where the records under review are stored.
- N. "Third party model or product" means a model or product provided by an entity separate from and not under direct or indirect corporate control of the insurer using the model or product.
- O. "Insurance compliance audit" means a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing noncompliance with, or promoting compliance with laws, regulations, orders, or industry or professional standards, which is conducted by or on behalf of a company licensed or regulated under the insurance laws of this state, or which involves an activity regulated under Title 48.
- P. "Insurance compliance self-evaluative audit document" means documents prepared as a result of or in connection with an insurance compliance audit. An insurance compliance self-evaluative audit document may include:
- (1) a written response to the findings of an insurance compliance audit;

- (2) any supporting information that is collected or developed for the primary purpose and in the course of an insurance compliance audit including but not limited to, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys;
- (3) any of the following:
 - (a) an insurance compliance audit report prepared by an auditor, who may be an employee of the company or an independent contractor, which may include the scope of the audit, the information gained in the audit, and conclusions and recommendations, with exhibits and appendices;
 - (b) memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues;
 - (c) an implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance; or
 - (d) analytic data generated in the course of conducting the insurance compliance audit.

Section 4. Market Analysis Procedures

- A.
 - (1) The commissioner shall collect and report market data information to the NAIC's market information systems, including the complaint database system, the examination tracking system, the regulatory retrieval system, or other successor systems, or to additional systems as the commissioner determines is necessary for market analysis.
 - (2) Market data and information that is collected and maintained by the Commissioner shall be compiled and submitted in a manner that meets the requirements of the NAIC and its systems.
- B.
 - (1) The commissioner shall gather information from data currently available to the Insurance Department, surveys, required reports, information collected by the NAIC, other sources in both the public or private sectors, and information from within and outside the insurance industry. The commissioner may request

insurers to submit data and information that is necessary to conduct market analysis.

- (2) The information shall be analyzed in order to develop a baseline understanding of the marketplace and to identify for further review insurers or practices that deviate significantly from the norm or that may pose a potential risk to the insurance consumer. The commissioner shall use the NAIC Market Analysis Handbook, or a successor product, as one resource in performing this analysis.

- C. (1) If the commissioner determines, as a result of market analysis, that further inquiry into a particular insurer or practice is needed, the following continuum of market conduct actions will be considered prior to conducting a targeted, market conduct examination. The action selected shall be made known to the insurer in writing if the action involves insurer participation or response. These actions may include, but are not limited to:

- (a) Correspondence with the insurer;
- (b) Insurer interviews;
- (c) Information gathering;
- (d) Policy and procedure reviews;
- (e) Interrogatories;
- (f) Review of insurer self-evaluation and compliance programs. This may include consideration of the insurer's membership in a best practices organization so long as the central mission of the organization is the promotion of high ethical standards in the insurance marketplace and the commissioner is satisfied that the organization's qualification process is likely to provide reasonable assurance of compliance with pertinent insurance laws.
- (g) Desk examinations.
- (h) Investigations

- (2) Except in extraordinary circumstances, the commissioner shall select the least intrusive and most cost-effective market conduct action that the commissioner determines will provide the necessary protections for consumers.

- D. The commissioner shall take those steps reasonably necessary to eliminate duplicative inquiries and coordinate market conduct actions and findings with other states.
- E. For purposes of conducting an examination or other market conduct action on an insurer, the commissioner may examine or conduct a market conduct action on any managing general agent or other person, insofar as that examination or market conduct is, in the sole discretion of the commissioner, necessary or material to the examination or market conduct action of the insurer.

Section 5. Protocols for Market Conduct Actions

- A. Market conduct actions shall be taken as a result of market analysis and shall focus on the general business practices and compliance activities of insurers rather than identifying infrequent or unintentional random errors that do not cause significant consumer harm.
- B.
 - (1) The commissioner is authorized to determine the frequency and timing of such market conduct actions. The timing shall depend upon the specific market conduct action to be initiated, unless extraordinary circumstances indicating a risk to consumers require immediate action.
 - (2) If the commissioner has information that more than one insurer is engaged in common practices that may violate statutes or regulations, the commissioner may schedule and coordinate multiple examinations simultaneously.
- C. The insurer may be given an opportunity to resolve matters that arise as a result of a market analysis to the satisfaction of the commissioner before any additional market conduct actions are taken against the insurer.
- D. For any change made to an NAIC work product referenced in this Act that materially changes the way in which market conduct actions are conducted, the commissioner shall give notice and provide parties with an opportunity for a public hearing pursuant to or the commissioner shall use the versions of the work products most recently developed and adopted by the NAIC.

Section 6. Targeted On-Site Market Conduct Examinations

- A. When the commissioner determines that other market conduct actions identified in Section 4B are not appropriate, the commissioner has the discretion to conduct targeted, on-site market conduct examinations in accordance with the *NAIC Market Conduct Uniform Examination Procedures* and the *Market Conduct Examiners Handbook*, (or successor products). RCW 48.03.010 shall not apply to market conduct examinations insofar as that statute requires periodic or regular examinations.
- B. In lieu of an examination of a foreign or alien insurer licensed in this state under this Act, the commissioner may accept an examination report of another state provided that the state has a market surveillance system the commissioner deems comparable to the market surveillance system set forth in this law.
- C. (1) Prior to commencement of a targeted on-site market conduct examination, market conduct surveillance personnel shall prepare a work plan consisting of the following:
 - (a) The name and address of the insurer being examined;
 - (b) The name and contact information of the examiner-in-charge;
 - (c) The justification for the targeted, on-site examination;
 - (d) The scope of the targeted, on-site examination;
 - (e) The date the on-site examination is scheduled to begin;
 - (f) Notice of any non-insurance department personnel who will assist in the examination;
 - (g) A time estimate for the targeted, on-site examination;
 - (h) A budget for the targeted, on-site examination if the cost of the examination is billed to the insurer; and
 - (i) An identification of factors that will be included in the billing if the cost of the examination is billed to the insurer.

- D. Market conduct examinations shall, to the extent feasible, utilize desk examinations and data requests prior to an on-site examination.
- E. Market conduct examinations shall be conducted in accordance with the provisions set forth in the NAIC *Market Conduct Examiners Handbook* and the NAIC *Market Conduct Uniform Examinations Procedures*, (or successor products).
- F. The department shall use the NAIC Standard Data Request, (or successor product).
- G. Announcement of the examination shall be sent to the insurer and posted on the NAIC's *Examination Tracking System* (or successor NAIC product, as determined by the commissioner) as soon as possible but in no case later than sixty (60) days before the estimated commencement of the on-site examination, except where the exam is conducted in response to extraordinary circumstances as described in Section 5B(1). The announcement sent to the insurer shall contain the examination work plan and a request for the insurer to name its examination coordinator.
- H. The commissioner shall conduct a pre-examination conference with the insurer examination coordinator and key personnel to clarify expectations thirty (30) days prior to commencement of the examination.
- I. Prior to the conclusion of a targeted on-site market conduct examination, the individual among the market conduct surveillance personnel who is designated as the examiner in-charge shall schedule an exit conference with the insurer.
- J. (1) If the commissioner elects to issue an examination report, the commissioner shall adhere to the following timeline, unless a mutual agreement is reached with the insurer to modify the timeline:
 - (a) The commissioner shall deliver the draft report to the insurer within sixty (60) days of the completion of the examination. Completion of the examination shall be defined as the date the commissioner confirms in writing that the examination is completed.
 - (b) The insurer shall respond with written comments within thirty (30) days of receipt of the draft report.
 - (c) The department shall make a good faith effort to resolve issues informally and prepare a final report within thirty

(30) days of receipt of the insurer's written comments, unless a mutual agreement is reached to extend the deadline. The commissioner may make corrections and other changes to the report, as appropriate.

(d) The insurer shall, within thirty (30) days, accept the final report, accept the findings of the report or request a hearing. An additional thirty (30) days shall be allowed if agreed to by the commissioner and the insurer. Any such hearing request shall be made in writing and shall follow [insert reference to appropriate administrative procedure act].

(2) The insurer's response shall be included in the final report. The response may be included as an appendix or in the text of the examination report. The insurer is not obligated to submit a response. Individuals involved in the examination should not be named in either the report or the response except to acknowledge their involvement.

K. (1) Upon adoption of the examination report pursuant to Subsection H, the commissioner shall continue to hold the content of the examination report as private and confidential for a period of thirty (30) days, except to the extent provided for in Paragraph (2) of this subsection. Thereafter, the commissioner shall open the report for public inspection, provided no court of competent jurisdiction has stayed its publication.

(2) Nothing contained in this Act shall prevent or be construed as preventing the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, in accordance with the provisions of RCWA §48.02.065, to the Insurance Department of this or any other state or agency of the federal government at any time, provided the agency or office receiving the report or matters relating thereto agrees to hold it confidential and in a manner consistent with this Act.

L. (1) The reasonable and necessary costs of a market conduct examination may be assessed against the insurer under examination. The fees shall be consistent with that otherwise authorized by RCW §48.03.060. The fees shall be itemized and bills shall be provided to the insurer on a monthly basis for review prior to submission for payment or as otherwise provided by state law.

- (2) The commissioner shall maintain active management and oversight of examination costs, including costs associated with the commissioner's own examiners and with retaining qualified contract examiners necessary to perform an on-site examination. Any agreement with a contract examiner shall:
 - (a) Clearly identify the types of functions to be subject to outsourcing;
 - (b) Provide specific timelines for completion of the outsourced review;
 - (c) Require disclosure to the insurer of contract examiners' recommendations;
 - (d) Establish and utilize a dispute resolution or arbitration mechanism to resolve conflicts with insurers regarding examination fees; and
 - (e) Require disclosure of the terms of the contracts with the outside consultants that will be used, specifically the fees and/or hourly rates that can be charged.
- (3) The commissioner, or the commissioner's designee, shall review and affirmatively endorse detailed billings from the qualified contract examiner before the detailed billings are sent to the insurer.

Section 7. Access to Records and Information

- A. Except as otherwise provided by law, market conduct surveillance personnel shall have free, convenient and full access to all books and records, employees, officers and directors, as practicable, of the insurer during regular business hours.
- B. An insurer utilizing a third-party model or product for any of the activities under examination shall cause, upon the request of market conduct surveillance personnel, the details of such models or products to be made available to such personnel.
- C. Each officer, director employee and agent of an insurer shall facilitate and aid in a market conduct action or examination.
- D. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section.
- E. Market conduct surveillance personnel shall be vested with the power to issue subpoenas and examine insurance company personnel under oath

when the action is requested by the commissioner pursuant to RCW §48.03.070.

- F. Notwithstanding the provisions of Subsection A of this section, in order to assist in the performance of the commissioner's duties, the commissioner may:
- (1) Share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection A, with other state, federal and international regulatory agencies and law enforcement authorities and the NAIC and its affiliates and subsidiaries, provided that the recipient agrees to and has the legal authority to maintain the confidentiality and privileged status of the document, material, communication or other information;
 - (2) Receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the NAIC and its affiliates or subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and
 - (3) Enter into agreements governing the sharing and use of information consistent with this subsection.

Section 8. Confidentiality

- A. All data and documents, including but not limited to working papers, third party models or products, complaint logs, and copies thereof, created, produced or obtained by or disclosed to the commissioner or any other person in the course of any market conduct actions or examinations made pursuant to this Act, or in the course of market analysis by the commissioner of the market conditions of an insurer, or obtained by the NAIC as a result of any of the provisions of this Act, shall be confidential by law and privileged, shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action.
- B. If the commissioner elects to issue a report of an examination, a preliminary or draft report is confidential and not subject to disclosure by the commissioner nor is it subject to subpoena or discovery. This paragraph does not limit the commissioner's authority to use a preliminary

or draft report market conduct examination report and related information in furtherance of any legal or regulatory action or to release it in accordance with the provisions of RCW §48.02.065.

- C. An insurance compliance self-evaluative audit document that has been provided to the commissioner is confidential by law and privileged, shall not be made public by the commissioner, shall not be subject to subpoena and shall not be subject to discovery and shall not be admissible in evidence in any private civil action.
 - (1) The disclosure of any self-evaluative audit document to the commissioner or the commissioner's designee shall not constitute a waiver of any privilege that may otherwise apply.

Section 9. Market Conduct Surveillance Personnel

- A. Market conduct surveillance personnel shall be qualified by education, experience or professional designations. The commissioner may supplement the in-house market conduct surveillance staff with qualified outside professional assistance if the commissioner determines that the assistance is necessary.
- B. Market conduct surveillance personnel have a conflict of interest, either directly or indirectly, if they are affiliated with the management, have been employed by, or own a pecuniary interest in the insurer subject to any examination under this Act. This section shall not be construed to automatically preclude an individual from being:
 - (1) A policyholder or claimant under an insurance policy;
 - (2) A grantee of a mortgage or similar instrument on the individual's residence from a regulated entity if done under customary terms and in the ordinary course of business;
 - (3) An investment owner in shares of regulated diversified investment companies; or
 - (4) A settlor or beneficiary of a "blind trust" into which any otherwise permissible holdings have been placed.

Section 10. Immunity for Market Conduct Surveillance Personnel

- A. No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives, market conduct surveillance personnel or an examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this Act.

- B. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative, market conduct surveillance personnel or examiner pursuant to an examination made under this Act, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.
- C. A person identified in Subsection A shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this Act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.
- D. This section does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified Subsection A.

Section 11. Fines and Penalties

- A. Fines and penalties levied as a result of a market conduct action or examination shall be consistent, reasonable and justified.
- B. The commissioner shall take into consideration actions taken by insurers to maintain membership in, and comply with the standards of, best-practices organizations that promote high ethical standards of conduct in the marketplace, and the extent to which insurers maintain regulatory compliance programs to self-assess, self-report and remediate problems detected and may include those considerations in determining the appropriate fines or penalties levied in accordance with Subsection A.

Section 12. Coordination with Other States Through the NAIC

- A. The commissioner shall share information and coordinate the Insurance Department's market analysis, market conduct actions and examination efforts with other states. Such matters will be coordinated in accordance with guidelines adopted by the National Association of Insurance Commissioners.
- B. If a market conduct examination or action performed by another state results in a finding that an insurer should modify a specific practice or procedure, the commissioner may, in lieu of conducting a market conduct action or examination, accept verification that the insurer made a similar

modification in this state.

Section 13. Additional Duties of the Commissioner

- A. At least once per year, or more frequently if deemed necessary, the commissioner shall provide in an appropriate manner to insurers and other entities subject to the insurance laws of this state information about new laws and regulations, enforcement actions and other information the commissioner deems relevant to ensure compliance with market conduct requirements. The failure of the commissioner to provide information shall not be a defense for an insurer that fails to comply with any insurance law of this state.
- B. The commissioner shall designate a specific person or persons within the Insurance Department whose responsibilities shall include the receipt of information from employees of insurers and licensed entities concerning violations of laws, rules or regulations by employers, as defined in this section. These persons shall be provided with proper training on the handling of such information. The information shall be deemed confidential and not open to public inspection.

Section 14. Effective Date

This Act shall take effect